Supreme Court, U. S.
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No. 78-1567

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

ROBERT D. HOLLEMAN,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

REPLY OF PETITIONER TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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Barely a month ago, the Court decided the case of Jackson v. Virginia, ____ U.S. ____, 47 L.W. 4883 (June 28, 1979), a habeas corpus appeal from the Fourth Circuit on behalf of a state prisoner in Virginia. Citing In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the Court went beyond Thompson v. Louisville, 326 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654 (1960) and held that a federal

habeas corpus court must consider not whether there was any evidence to support a state-court conviction, but whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. Now clearly the Court in Jackson v. Virginia was concerned solely with a state habeas corpus case, but we believe that much of what Mr. Justice Stewart said for the Court there can readily be applied to the case at hand. Sure a reasonable doubt instruction was given here. Was it sufficient protection under the Winship and Thompson standards? Clearly not. Must the petitioner wait and bring a separate action under 28 USC 2255 to obtain relief? We would hope not.

The Solicitor General argues, at page 7 of his brief that the petitioner Holleman and his co-defendants could not, under the District Court's instructions, have been convicted "merely on a finding that they made loans to the named borrower knowing the proceeds would be turned over to someone else", as in United States v. Gens, 493, F.2d 216 (1st Cir. 1974) and United States v. Gallagher, 576 F.2d 1028 (3rd Cir. 1978). Not so. When the instructions given by the District Court are considered, and those requested by counsel and denied are also considered, this contention of the Government evaporates, certainly with respect to the two lawyer-defendants, Holleman and Winders.

Did the lawyers know of an intent not to repay, or that the named borrowers did not consider themselves responsible to

repay or had no ability to repay? Even if the other defendants had the sort of intent or knowledge that met the text of the First Circuit in Gens, that can hardly be imputed to the lawyer-defendants, whose role was throughout a very limited and entirely proper one. The Third Circuit opinion in Gallagher, supra, reinforces the basic intra-circuit conflict in this area, a conflict which can only, sooner or later, be resolved in this Court. It cannot be permanently postponed, for coming behind this case are others, e.g. United States v. Bert Lance, now pending in the Northern District of Georgia.

Footnote 5, at page 7 of the Solicitor General's brief, misses the whole point of the argument for the petitioner Holleman. Certainly a defendant can be convicted as an aider and abettor even though charged as a principal. Here however, conviction as a principal requires that a defendant be among a special category of people. Specifically, he must have been an officer, agent or employee of a federally insured savings and loan association. Holleman was the general counsel of First Federal Savings and Loan here, though it was a title only, without salary or other compensation. The indictment purported to be charging him in that capacity, almost as though he were house counsel. The problem here, and a rather acute one in terms of the future of the petitioner Holleman, is one of variance and failure to give notice, and the Government's brief is not responsive on these points.

The Solicitor General, at pages 8-9 of his brief, substitutes innuendo for argument. The factor of "unusual speed" is the exact argument specifically repudiated by the Fifth Circuit in United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971). The argument here shows how the Government persists in viewing as sinister and criminal acts which are perfectly innocent according to the view of the Fifth Circuit in Musgrave. Clearly the Government is bothered and embarrassed by Musgrave. We are too, for unless this Court intervenes, we shall have to explain to our client why he must surrender his law license and go to prison when the lawyer-defendant (Bryant) in Musgrave went home from his trial and practiced law. There is simply no rational explanation for this.

It should also be noted that the loans in which the petitioner Holleman was involved were the first development loans made by First Federal in Durham. Since the type of loan was different, it is hardly surprising that the disbursement procedures should be different too, but not so "unusual" as the Solicitor General has suggested to the Court.

Finally, we cannot agree with the Solicitor General (pages 9-10 of his brief) that the severance issue was a factual one, inappropriate for certiorari nor that the cases of United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976) and United States v. Kelly, 349 F.2d 720 (2d Cir. 1965) are distinguishable. They could hardly be more on point.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted.

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CERTIFICATE OF SERVICE

I have this day mailed two copies of this reply brief to the Solicitor General at his office address in Washington.

This 3rd day of August, 1979.

James B. Craven III
James B. Craven III

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